79-1254

Supreme Court, U. S.
FILED
FEB 12 1980
JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No.

JOHN M. SANZA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In The

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No.

JOHN SANZA,

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner John M. Sanza respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on July 24, 1979.

OPINION BELOW

The opinion of the court of appeals, unpublished, appears in the appendix hereto. No opinion was rendered by the District Court for the District of Maryland.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on July 24, 1979. A timely petition for rehearing *en banc* was denied on August 31, 1979, without notifying counsel of record for the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether information supplied in the affidavit was so stale that there was a lack of probable cause at the time the state search warrant was executed and, therefore, the federal warrant, solely based on information obtained by the state warrant, was fruit of the poisonous tree and should have been suppressed.

STATEMENT OF THE CASE

On October 27, 1977, the petitioner was found guilty of violating 18 U.S.C. §1202(a)(1) (possession of firearm by convicted felon). On January 16, 1978 petitioner was sentenced to imprisonment for a period of two (2) years. The conviction rested upon evidence secured through a federal search warrant based upon information derived through a state search warrant.

On July 29, 1977 Baltimore City Police, acting on information obtained from Anne Arundel County Police, obtained a state warrant to search the premises of the petitioner herein. The specific articles to be seized were: (1) one Remington single shot .22 caliber rifle, model R105, serial number 11554050, and (2) one Savage Pump .22 caliber rifle, model and serial numbers unknown.

The probable cause for this state warrant were statements made by one John William Taylor, taken on June 20, 1977 and Jay Ray Kirkendall, taken on June 21, 1977. Both Taylor and Kirkendall gave statements to the police about various crimes, none however, related to the aforementioned rifles nor a

breaking and entering and larceny from 637 Cresswell Road, Baltimore, Maryland where the rifles were reported stolen from on May 10, 1977.

Later, during a tour of Anne Arundel County given by police officers, Mr. Taylor stated petitioner's residence was the place where he sold the rifles taken in the breaking and entering of a dwelling located at 637 Cresswell Road. This statement was not made under oath.

As the result of the issuance of the state search and seizure warrant, the residence of petitioner was searched and, although the two aforementioned rifles were not found, two other guns were found which were not seized as they apparently were not implicated in any criminal activity. Based on this information federal authorities obtained a search and seizure warrant, seized the guns under that warrant and subsequently formed the basis of petitioner's conviction.

REASON FOR GRANTING THE WRIT

I.

The decision below is in conflict with the Court's holdings requiring that probable cause exist at the time a warrant is issued.

The robbery of the Cresswell Road residence occurred on May 10, 1977. Statements were obtained from Taylor and Kirkendall on June 20, 1977 and June 21, 1977 respectively. The state warrant was not executed until June 29, 1977. Under the authority of this warrant the rifles in question were first seen. Petitioner contends that the information in the affidavit was so stale that there was a complete lack of probable cause to believe that the two rifles sought were still in the Sanza residence.

It is well settled that proof of probable cause must exist at the time a warrant is issued. *Sgro v. United States,* 287 U.S. 206,

217 (1932). In *Sgro,* a first warrant had been issued on July 6, 1926, relating to recent purchases of moonshine liquor. The warrant was renewed on July 27, 1926. The Court, commenting on the issuance of the second warrant, made it clear that unless the proof of probable cause existed at the time of the issuance of the second warrant, that warrant would fail. "The new warrant must rest upon a proper finding and statement that probable cause then exists." *Id.* at 211.

Petitioner suggests that nowhere in any of the statements relied upon by the government does there appear any statement by either Taylor or Kirkendall about removing rifles from 637 Cresswell Road or selling them to the petitioner.

The failure of the statements of Taylor and Kirkendall to indicate rifles were taken and sold to appellant, when the facts were fresh in their minds, and the failure of the search to turn up the rifles established the unreliability of the state affidavits, and further the lack of probable cause for the issuance of the federal warrants. The failure to specify a date when the alleged sale took place in the affidavits brings these facts within *Rosencranz v. United States,* 356 F.2d 310, 317 (1st Cir. 1966) where no date was specified in an affidavit for a search warrant.

When no date is given, "the door is open to an inference if a present offense is based on stale information. Generally, the Courts have refused to uphold warrants based — or possibly based — on stale information." *United States v. Boyd,* 422 F.2d 791, 792 (6th Cir. 1970). However, even when a date is specified as to alleged criminal activity, it is incumbent upon the police to demonstrate probable cause "on the date the warrant is issued." *Mapp v. Warden, N.Y. State Correctional Institution,* 531 F.2d 1167, 1171 (2nd Cir. 1976).

It is the petitioner's contention that neither the statements made by Taylor or Kirkendall nor any statement made by the affiant relates to any continuous or protracted criminal activity in relation to the guns sought so as to excuse the fifty-day delay

and justify the Fourth Circuit's reliance on uncollaborated statements. Petitioner is accused of buying two stolen rifles and not any continuous criminal activity which brings this case within the confines of *United States v. Johnson,* 461 F.2d 285, 287 (10th Cir. 1972) and *Bastida v. Henderson,* 487 F.2d 860, 864 (5th Cir. 1973) where both courts found that whether or not time plays a role in the determination of probable cause depends on the facts of each case. Petitioner respectfully suggests that the trial court erred as did the Fourth Circuit Court of Appeals in not suppressing the evidence as the fruit of a poisonous tree.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

s/ Burton W. Sandler

Attorney for Petitioner

APPENDIX — OPINION OF UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5075

John M. Sanza,

Appellant,

versus

United States of America,

Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frank A. Kaufman, District Judge

Submitted June 19, 1979. Decided July 24, 1979

Before HAYNSWORTH, Chief Judge, and WINTER and PHILLIPS, Circuit Judges.

E. Thomas Maxwell, Jr., Attorney for Appellant. Russell T. Baker, Jr., United States Attorney; Marsha A. Ostrer, Assistant United States Attorney; and Richard P. Kidwell, Law Clerk, Attorneys for Appellee.

PER CURIAM:

John Matthew Sanza, convicted of possession of a firearm after having been convicted of a felony, 18 U.S.C. App. § 1202(a)(1), appeals contending that evidence was improperly admitted against him. The evidence in question, two rifles, was seized during the execution of a federal search warrant that was

based on information obtained in the previous execution of a state warrant. Sanza's contention is that the state warrant was based on stale information and therefore was not supported by probable cause. Since the federal warrant issued solely on the basis of information obtaining [sic] during the execution of the state warrant, Sanza argues that the rifles should have been suppressed as fruits of the poisoned tree.

On May 10, 1977, the two rifles were stolen from a residence in Anne Arundel County, Maryland. The information before the state official indicated that the rifles were taken to Sanza's residence and sold to him. The date of sale was not indicated, but the district court assumed, as do we, that it occurred on May 10. The state warrant issued on June 29, 1977 and was based on information learned shortly before that date by the police, that is, some fifty days after the rifles were supposedly delivered to the residence to be searched.

The information presented to the state official also included statements by a veteran police officer with great experience relating to burglary investigations to the effect that easily identified stolen goods are frequently held for substantial lengths of time before being sold. These rifles, both of which contained serial numbers, are such goods and we believe the conclusion that they were still being held by Sanza, who had a history of dealing in stolen goods, was therefore reasonable. *See, e.g., United States v. Harris,* 403 U.S. 573, 583 (1971); *United States v. Rosenbarger,* 536 F.2d 715, 719 (6th Cir. 1976).

Since the state warrant was based on probable cause, the federal warrant was not tainted and the evidence properly admitted. Accordingly, we dispense with oral argument and affirm the conviction.

AFFIRMED.

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 78-5075

United States of America,

Appellee,

versus

John Sanza,

Appellant.

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ordered that the petition for rehearing is denied.

Entered at the direction of Judge Phillips for a panel consisting of Judge Haynsworth, Judge Winter, and Judge Phillips.

For the Court,

CLERK